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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC., *Petitioner,*

v.

SAINT CLAIR ADAMS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Kelly v. Robinson, 479 U.S. 36 (1986) 20
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Maciewjewski v. Alpha Systems Laboratories, Inc.,
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Pittston Coal Group v. Sebben,
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United Electrical Radio & Machine Workers v. Miller Metal Products, Inc., 215 F.2d 221
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United States v. Darby,
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Western Air Lines, Inc. v. Board of Equalization,
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Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. 1
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<http://www.leginfo.ca.gov/pub/bill/asm/ab_0851-0900/ab_858_bill_20000124_amended_sen.pdf> 2

TABLE OF AUTHORITIES
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Arbitration of Interstate Commercial Disputes, Hearing before the Joint Committee of Subcommittees on the Judiciary, 68th Cong., 1st Sess. (1924) .... *passim*
65 Cong. Rec. H11081 (June 6, 1924) 18, 22
66 Cong. Rec. H3004 (Feb. 4, 1925) 22
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H.R. Rep. No. 68-96 (1924) 18
Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing before Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. (1923) ... *passim*
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S. Rep. No. 68-536 (1924) 18, 25

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53 ABA Reports (1928) ..... *passim*
A Standard Dictionary of the English Language (1903) 11
American Heritage Dictionary of the English Language (3d ed. 1992) 11

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Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. Rev. 428 (1932) . 17, 20
Henry C. Black, *A Law Dictionary* (2d ed. 1910) 11
Brief for the American Federation of Labor and Congress of the Industrial Organizations as *Amicus Curiae* in Support of Petitioner, *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18 (U.S. Nov. 15, 1990) ..... *passim*
Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes, 9A Lab. Rel. Rep. (BNA) No. 142, at 534 (May 9, 1995) 8
Matthew W. Finkin, *Employment Contracts under the FAA—Reconsidered*, 84 Lab. L.J 329 (1997) 18, 21
Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996) 9
John J. George, *Motor Carrier Regulation in the United States* (1929) 9
1 Patrick Hardin, *The Developing Labor Law* (3d ed. 1992) 8
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Douglas L. Leslie, *The Railway Labor Act* (1995) 9
Ian R. MacNeil, *American Arbitration Law* (1992) 19, 20, 27
1 Ian R. MacNeil *et al.*, *Federal Arbitration Law* (1999) 24

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Proceedings of the 26th Annual Convention of the 26th Annual Convention of the International Seamen's Union of America (1923) 27

Proceedings of the 45th Annual Convention of the American Federation of Labor (1925) 27

Report of the New York State Legislative Committee on Industrial and Labor Relations (1940) 27

David Sherwyn *et al.*, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bathwater, and Constructing a New Sink in the Process*, 3 U. Penn. J. Lab. & Emp. L. 73 (1999) 29

2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17 (6th ed 2000) 6

Robert L. Stern, *The Commerce Clause and the National Economy, Part I*, 49 Harv. L. Rev. 645 (1946) 14

The International Encyclopedia Dictionary (1901) 11

Noah Webster, *An American Dictionary of the English Language* (C. Goodrich rev. ed. 1859) 11

Webster's Third New International Dictionary (1971) 11

Wesley A. Sturges, *A Treatise on Commercial Arbitration and Awards* (1930) 25

INTERESTS OF *AMICUS CURIAE*[1]

The Employers Group is a nonprofit corporation headquartered in the State of California. With nearly 5,000 member companies employing approximately 2.5 million employees, the Employers Group is the nation's oldest and largest human resource management association. Its purpose is to educate its members about employment law and keep them informed of employment issues. In addition, the group routinely represents the interests of its members in the legislative process and files briefs *amicus curiae* in cases in which those interests are implicated.

Many of the Employers Group's member companies have agreed in contracts of employment to arbitrate disputes with their employees. These arbitration agreements enable both employers and employees alike to avoid the expense of litigation. Just as importantly, these agreements also help to promote and preserve cooperative, productive working environments by resolving disputes quickly before they create permanent mistrust and estrangement.

California has long been hostile to the enforcement of arbitration agreements in the employment area. This Court has already held that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, preempts a California law barring arbitration of wage disputes, *see Perry v. Thomas*, 482 U.S. 483 (1987); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984) (holding that the FAA preempts application of a California law concerning franchise investments), and the California legislature recently considered legislation prohibiting employers from even requesting an agreement to arbitrate in most employment contracts (and rendering any such agreements

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[1] Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *amicus* and its counsel has made any monetary contribution to the preparation and submission of this brief.

unenforceable).[2] Arbitration agreements in employment contracts have also repeatedly been attacked in California courts as unconscionable contracts of adhesion and as contrary to public policy. *See, e.g., Kinney v. United HealthCare Serv.*, 70 Cal. App. 4th 1322 (1999) (unconscionable); *Stirlen v. Supercuts*, 51 Cal App. 4th 1519 (1997) (unconscionable and contrary to public policy). In fact, the California Supreme Court is currently considering an unconscionability claim in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 973 P.2d 51 (Cal. 1999), and it has deferred consideration of a number of similar claims pending its ruling in that case.[3] As a consequence, if this Court were to find that all contracts of employment are excluded from the coverage of the FAA, many agreements to arbitrate involving the Employers Group's member companies could become unenforceable. Because of the importance of this issue to its members and to the country as a whole, the Employers Group has a vital interest in the question presented in this case.

INTRODUCTION AND SUMMARY

Ten years ago, several *amici* questioned whether the FAA applies to any employment contracts. *See Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991). Such contracts, the *amici* argued, are not covered by the FAA because they fall within the exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" in

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[2] *See* A.B. 858, 1999-2000 Reg. Sess., § 2 (Cal. May 3, 1999) <http://www.leginfo.ca.gov/pub/bill/asm/ab_0851-0900/ab_858_bill_20000124_amended_sen.pdf>.

[3] *See, e.g., Ramirez v. Circuit City Stores, Inc.*, 995 P.2d 137 (Cal. 2000); *Maciejewski v. Alpha Sys. Lab, Inc.*, 986 P.2d 170 (Cal. 1999); *Pichly v. Nortech Waste*, 986 P.2d 169 (Cal. 1999); *Lee v. Technology Integration Group*, 978 P.2d 1 (Cal. 1999); *Gonzales v. Hughes Aircraft Employees Federal Credit Union*, 978 P.2d 1 (Cal. 1999).

Section 1 of the Act. 9 U.S.C. § 1. Although this Court decided to "leave for another day the issue raised by *amici curiae*," *Gilmer*, 500 U.S. at 25 n.2, eleven circuits and one state supreme court have since determined or reaffirmed that this exclusion covers only contracts of individuals employed in the interstate or international transportation of goods and people.[4] Indeed, the Ninth Circuit is the only circuit considering the issue after *Gilmer* to find that the contract-of-employment exclusion covers all employment contracts.

The Ninth Circuit adopted this anomalous position in a 1999 decision captioned *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), which the *per curiam* decision below followed without comment. *See Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131, 1132 (9th Cir. 1999). While most courts have focused on the language of the exclusion in Section 1, in *Campbell Soup* the Ninth Circuit took a different tack. It focused upon history, arguing that an expansive reading of the exclusion is supported by the historical understanding of its language, the historical scope of Congress' commerce power, and the Act's legislative history. *See* 177 F.3d at 1084-90. As demonstrated below, these historical arguments are irrelevant because the meaning of the text of the exclusion is plain. In

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[4] *See Brennan v. King*, 139 F.3d 258, 264 n.5 (1st Cir. 1998); *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-36 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998)(op. of Cox, J. and Tjoflat, J.); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997); *Brown v. KFC Nat'l Management Co.*, 921 P.2d 146, 156 & n.13 (Haw. 1996).

addition, the historical arguments are without merit. First, there is no material difference between the current understanding of the language of the exclusion and the understanding in 1925 when the FAA was first enacted. Second, even in 1925, the commerce power was not as circumscribed as the Ninth Circuit suggested in *Campbell Soup*. Finally, the legislative history is ambiguous and contradictory, and it therefore fails to provide a basis for departing from the plain language of the contract-of-employment exclusion.

ARGUMENT

I. THE FAA COVERS EMPLOYMENT CONTRACTS OF PERSONS NOT INVOLVED IN INTERSTATE OR INTERNATIONAL TRANSPORTATION.

Although the Ninth Circuit holds that the Federal Arbitration Act does not apply to any contracts of employment, neither the decision below nor the *Campbell Soup* opinion actually analyzes the language of the contract-of-employment exclusion. This is not surprising: that language clearly does not cover all employment contracts. Moreover, contrary to the suggestion in *Campbell Soup*, Section 2 of the FAA does not indicate otherwise. Indeed, that section supports the more limited reading of the exclusion that every other court of appeals to consider the question has adopted.

A. The Contract-of-Employment Exclusion Covers Only Contracts of Individuals Engaged in Interstate or International Transportation.

The final sentence of Section 1 of the FAA provides:

> nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1. As the heading of Section 1 suggests, and the context makes clear, this passage does not simply limit the

definitions of "maritime transactions" and "commerce" in the rest of Section 1; the exclusion limits the application of the statute as a whole. *See Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines*, 192 F.2d 310, 312 (3d Cir. 1951) (noting that the heading was enacted into positive law in 1947). Even more pertinently, under well-settled rules of statutory interpretation, this exclusion does not encompass all contracts of employment, but is instead limited to contracts governing the employment of individuals engaged in the interstate or international transportation of goods and people.

As this Court recently reiterated, "[s]tatutory language must be read in context" because "a phrase gathers meaning from the words around it." *Jones v. United States*, 527 U.S. 373, 389 (1999) (quotation omitted); *see also Neal v. Clark*, 95 U.S. 704, 708 (1877) ("It is a familiar rule in the interpretation of . . . statutes that a passage will be interpreted by reference to that which precedes and follows it.") (quotation omitted). As a consequence, when words in a statute are "grouped in a list," those words "should be given related meaning." *Third Nat'l Bank in Nashville v. Impac, Ltd.*, 432 U.S. 312, 322 (1977). And when a statutory list contains several specific terms followed by a general one, it has long been recognized that "the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. United States*, 522 U.S. 398, 404 n.2 (1998) (quotation omitted); *see also Cleveland v. United States*, 329 U.S. 14, 18 (1946) (noting that "general words are confined to the class and may not be used to enlarge it"); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (noting that this principle "limits general terms which follow specific ones to matters similar to those specified"); *Mid-Northern Oil Co. v. Walker*, 268 U.S. 45, 48-49 (1925) (same).

This principle, which is often referred to as the "*ejusdem generis*" or "of the same kind" rule, is based upon a sound,

practical consideration: if the general term in a list is construed to its widest extent, it may render the more specific terms preceding it superfluous. It is, however, a "cardinal principle of statutory construction" that, unless absolutely necessary, courts must not ignore any portion of a statute or render it meaningless; instead, they must "give effect, if possible, to every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (quotation omitted); *see also Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997). Accordingly, when a general term is preceded by specific terms encompassed by that term, under the *ejusdem generis* principle, the general term is normally interpreted to embrace only objects similar in scope to the specific terms. *See* 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17, at 272-74 (6th ed. 2000). In this way, both the specific and the general terms are given meaning because the specific terms define the class to which the general term extends. *See id.* at 283-85.

The *ejusdem generis* principle plainly applies to the FAA's contract-of-employment exclusion. That exclusion contains a list in which specific terms ("seamen" and "railroad employees") precede a general term ("any other class of workers engaged in foreign or interstate commerce"), and, as several courts of appeals have noted, if the general term in the exclusion were interpreted to extend to its fullest scope, it would "rob the rest of the exclusion clause of all significance." *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (quotation omitted); *accord Cole v. Burns Int'l. Sec. Serv.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 836 (8th Cir. 1997); *Asplundh Tree Expert v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995).

Two additonal considerations support application of the *ejusdem generis* principle here. First, the exclusion does not simply refer to "any class of workers engaged in foreign or interstate commerce"; it refers to "any *other* class of workers

engaged in foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), thereby indicating a limitation on the scope of the excluded class that is linked to the workers previously enumerated in the exclusion. Second, the exclusion carves out an exception to social legislation and must therefore be narrowly construed. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993); *A.H. Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1945). Thus, under the *ejusdem generis* principle, the exclusion's reference to "any other class of workers engaged in foreign or interstate commerce" should be read in light of the prior references to "seamen" and "railroad workers" to extend only to the class of workers typified by seamen and railroad workers, that is, to workers involved in the transportation of goods and persons in interstate and foreign commerce.

It is, of course, true that the *ejusdem generis* principle is only a rule of construction used in ascertaining the intent of Congress and that it "may not be used to defeat the obvious purpose of legislation." *Gooch*, 297 U.S. at 128. A narrow reading of the exclusion, however, furthers rather than defeats the goal of the FAA. The Act was intended primarily to "ensure judicial enforcement of privately made agreements to arbitrate" and secondarily to "promote the expeditious resolution of claims" without the "costliness and delays of litigation." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (quotation omitted); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983) (noting the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements"). Application of the *ejusdem generis* rule furthers both of these goals because it narrows the scope of the exclusion for contracts of employment, thereby ensuring that more agreements to arbitrate will be enforced and more costly litigation avoided in spite of any state laws hostile to arbitration. *Cf. Southland*, 465 U.S. at 16 (holding that the FAA preempts "state

legislative attempts to undercut the enforceability of arbitration agreements").

Moreover, it makes good sense to apply the FAA to contracts of employment. Arbitration gives parties the flexibility to choose decisionmakers with specialized expertise that judges may lack and to tailor procedures to particular disputes. *See, e.g.*, James A. King *et al.*, *Agreeing to Disagree on EEO Disputes*, 9 Lab. Law. 97, 100 (1993); *see also Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes*, 9A Lab. Rel. Rep. (BNA) No. 142, at 534:401 (May 9, 1995) (recommending procedures for arbitrating employment disputes involving statutory rights). Just as importantly, because arbitration is quicker and cheaper than litigation, it is more accessible to employees and more economical for employers, and it avoids much of the psychological stress and reputational harms associated with litigation that can poison the employment relationship. *See, e.g.*, David Sherwyn *et al.*, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bathwater, and Constructing a New Sink in the Process*, 3 U. Penn. J. Lab. & Emp. L. 73, 81-82, 91-99 (1999); King, *Agreeing to Disagree*, 9 Lab. Law. at 99-101. Indeed, it is because of these many advantages that arbitration has become "the primary mechanism for resolving disputes arising under collective bargaining agreements." 1 Patrick Hardin, *The Developing Labor Law* 1008 (3d ed. 1992).

In addition, Congress had good reason to exclude seamen and railroad workers from the FAA. While the Act makes agreements to arbitrate future disputes as well as any resulting awards enforceable, *see* 9 U.S.C. §§ 2, 13, earlier statutes treated seamen and railroad workers differently. One statute made certain arbitration agreements between seamen and their employers voluntary for seamen, *see* 46 U.S.C. § 651; *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925), and while a second statute made arbitration mandatory for employment

disputes involving railroads, it provided no mechanism for enforcement. *See* Transportation Act of 1920, 41 Stat. 456, 469-74 (1920); Douglas L. Leslie, *The Railway Labor Act* 36-37 (1995).

Ignoring these considerations, the Ninth Circuit argued in *Campbell Soup* that a narrow interpretation of the contract-of-employment exclusion makes little sense because transportation workers besides railroad workers and seamen were not subjected to any statutory dispute resolution scheme in 1925. *See* 177 F.3d at 1092. However, as Chief Judge Posner pointed out, Congress may have anticipated that modes of transportation such as airplanes and motor carriers would, when they matured, be subjected to comprehensive regulation. *See Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997).[5] In any event, there is no rule requiring that exceptions to economic legislation be narrowly tailored to the same broad principle. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970). Indeed, Congress can, and does, carve out statutory exceptions based on no principle beyond political

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[5] Citing a law review article, the Ninth Circuit asserted that motor transportation was already "a critical subject of Congress' interstate commerce power" in 1925. *See Compbell Soup*, 177 F.3d at 1092 (citing Matthew W. Finkin, *"Workers' Contracts" under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 291(1996)). That article, however, says only that "[t]he interstate transportation of goods and passengers by motor carrier was not an insignificant part of interstate commerce," Finkin, *Workers' Contracts*, 17 Berkeley J. Empl. & Lab. L. at 291, and while it asserts that the "visibility of these enterprises politically was heightened by the legal contest over their regulatory status at the time," *id.* at 291 & n.40, it cites only a decision of this Court applying the dormant commerce clause to state regulation of interstate carriers in support of that assertion. *See id.* (citing *Buck v. Kuykendall*, 267 U.S. 307 (1925)). Moreover, according to an authority cited by the article, no federal regulation of interstate carriers had even been proposed when the FAA was debated and enacted. *See* John J. George, *Motor Carrier Regulation in the United States* 234-46 (1929).

influence and power. As a consequence, the Ninth Circuit's criticism provides no justification for refusing to apply the *ejusdem generis* principle to the contract-of-employment exclusion.

B. Section 2 of the FAA Supports a Narrow Interpretation of the Exclusion.

In *Campbell Soup*, the Ninth Circuit argued that Section 2 of the FAA supports an expansive interpretation of the contract-of-employment exclusion because that section does not cover contracts of employment. *See* 177 F.3d at 1084-85. In fact, just the opposite is true: Section 2 covers contracts of employment, and it supports a narrow interpretation of the contract-of-employment exception.

The Ninth Circuit's reading of the contract-of-employment exclusion cannot be reconciled with the structure of the FAA. As this Court has recognized, Section 2 is the "primary substantive provision" of the Act, *Gilmer*, 500 U.S. at 24, and the other portions of the Act are therefore interpreted in light of the limitations upon the scope of Section 2, *see Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956). Consequently, if Section 2 did not cover contracts of employment, the contract-of-employment exclusion in Section 1 would be superfluous. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967). As a "cardinal principle of statutory construction is to save and not to destroy," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), the Ninth Circuit's interpretation must be rejected unless it is compelled by the plain language of the statute.

The language of Section 2 is, however, more than broad enough to encompass contracts of employment. By its terms, Section 2 applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The term "transaction" can refer to any "communicative action or activity involving

two parties or two things reciprocally affecting or influencing each other." *Webster's Third New Int'l Dictionary* 2425 (1971); *see also American Heritage Dictionary of the English Language* 1899 (3d ed. 1992) (defining "transaction" to include any "[c]ommunication involving two or more people that affects all those involved"). Because the parties to an employment contract exchange mutually binding promises, thereby "reciprocally affecting or influencing each other," employment contracts fit comfortably within the definition of "transaction."

In *Campbell Soup*, the Ninth Circuit reached a different conclusion based upon the supposed understanding of the word "transaction" in 1925 when the FAA was passed. According to the court of appeals, at that time the word "transaction" referred only to "business deals" or to acts "involving buying and selling." 177 F.3d at 1085. An employment contract *is*, however, a sort of business deal. Even more importantly, in 1925, the term "transaction" had a much broader meaning than the Ninth Circuit admits. Although the term could be used to apply to the buying and selling of goods, it also applied more generally to "the doing, performing or carrying out of *anything*." *The International Encyclopedia Dictionary* 4150 (1901) (emphasis added); *see also* Noah Webster, *An American Dictionary of the English Language* 1166 (C. Goodrich rev. ed. 1859) (defining "transaction" to mean "[t]he doing or performing of any business" or "management of any affair"); *A Standard Dictionary of the English Language* 1915 (1903) ("the conduct or management of *any* undertaking or business affair") (emphasis added). Moreover, in legal usage, the term referred to "[w]hatever may be done by one person which affects another's rights, and out of which a cause of action may arise." Henry C. Black, *A Law Dictionary* 1166 (2d ed. 1910). Thus, the Ninth Circuit's reliance on the historical understanding of the term is misplaced because even in 1925, Section 2's reference to "transaction" could easily have been interpreted to encompass contracts of employment.

II. EVEN IN 1925, THE EXCLUSION DID NOT COVER ALL EMPLOYMENT CONTRACTS SUBJECT TO CONGRESSIONAL REGULATION.

In *Campbell Soup*, the Ninth Circuit argued that the FAA should not be interpreted to cover any contracts of employment now because the statute did not reach such contracts when it was enacted in 1925. *See* 177 F.3d at 1086-88. According to the Ninth Circuit, at that time Congress' power to regulate pursuant to the Commerce Clause was "limited to employees who actually transported people or goods in interstate commerce." *Id.* at 1087. Since Section 1 excludes employment contracts involving such individuals, the Ninth Circuit reasoned that Congress did not intend the FAA to apply to any employment contracts and that the Act should not be interpreted to cover any employment contracts under the more expansive Commerce Clause power now recognized. *See id.* at 1087-88. This argument suffers from three defects.

First, the Ninth Circuit's argument ignores the language of the exclusion. As other courts of appeals have recognized, if Congress had intended to exclude all employment contracts from the FAA, it "could simply have said 'nothing herein shall apply to contracts of employment.'" *Cole*, 105 F.3d at 1471-72; *accord O'Neil*, 115 F.3d at 274; *Rojas*, 87 F.3d at 748. Section 1, however, provides that "nothing herein contained shall apply to contracts of employment *of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). In light of the cardinal rule that courts must "avoid a reading which renders some words altogether redundant," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995), these additional words of limitation cannot be ignored and the exclusion therefore cannot be interpreted to reach all employment contracts.

Second, the argument incorrectly assumes that when Congress enacted the FAA, it viewed its power to regulate

arbitration agreements in employment contracts as limited to the area of interstate and international transportation.

This assumption is based on this Court's interpretation of the scope of the Commerce Clause prior to 1937. *See Campbell Soup*, 177 F.3d at 1086-87. Congress did not, however, rely solely upon the Commerce Clause in enacting the FAA. As Justice O'Connor has demonstrated, when it passed the FAA, "Congress thought it was exercising its power to dictate either procedure or 'general federal law' in federal courts." *Southland*, 465 U.S. at 23 (O'Connor, J., dissenting); *see also* H.R. Rep. No. 68-96, at 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . ."). While this view proved incorrect—this Court later held that the duty to arbitrate is substantive rather than procedural, *see Bernhardt*, 350 U.S. at 202-04, and that there is no general federal common law, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)—Congress' reliance on its supposed power to prescribe procedure and general federal common law nonetheless undermines the Ninth Circuit's assumption that Congress doubted its power to include employment contracts outside the transportation sector in the FAA.

In any event, even in 1925 Congress's authority under the Commerce Clause was far broader than the Ninth Circuit assumed. Although during this period this Court sometimes characterized certain economic activities as beyond the scope of Congress' power under the Commerce Clause, *see, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941), its decisions in the period were "not marked . . . by a coherent or consistent course of interpretation." *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); *see generally* Robert L. Stern, *The Commerce Clause and the National Economy, Part I*, 49 Harv. L. Rev. 645, 647-53 (1946).

Even more importantly, this Court has never suggested that commerce was limited to transportation. To the contrary, by 1925 it was well settled that interstate commerce "includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241 (1899); *see also Real Silk Hosiery Mills v. Portland*, 268 U.S. 325, 335 (1925) ("The negotiation of sales of goods which are in other States, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.") (quotation omitted). Moreover, by 1925 transportation was not the only "instrumentality" of commerce recognized by this Court: nearly fifty years before that time, this Court recognized that telegraphs were also instrumentalities of commerce. *See Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1877). Thus, under any interpretation of the Commerce Clause, Congress' authority stretches beyond interstate transportation to encompass interstate communications as well as the buying and selling of goods across state lines.

Although Congress did not attempt in 1925 to regulate employment in these areas, it had clear authority to do so. According to the decisions of this Court at the time, Congress' power to regulate under the Commerce Clause extended to "every instrument and agent by which such commerce is carried on," and the men who performed or made possible the various "act[s] of interstate commerce" were treated as "agents . . . of commerce" subject to congressional regulation. *In re Second Employer's Liab. Cases*, 223 U.S. 1, 47-48 (1912). Consequently, in 1925 Congress possessed recognized authority under the Commerce Clause to enact legislation concerning the "conditions under which those agents . . . perform the work of interstate commerce" so long as that legislation had a "real or substantial connection with the interstate commerce." *Id.* at 48-49; *see also First Employer's Liab. Cases*, 207 U.S. 463, 495 (1908) (noting that Congress

has the "power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on the subject are solely confined to interstate commerce"). Thus, the employment of individuals engaged in interstate sales and interstate communications was every bit as subject to regulation by Congress as the employment of individuals engaged in interstate transportation.

Third, there is no reason to assume that Congress intended the contract-of-employment exclusion to expand in tandem with Section 2. The Ninth Circuit's opinion assumes that, if Section 1 excluded all employment contracts in 1925, it should continue to exclude all employment contracts covered by that Section despite the subsequent liberalization of this Court's interpretation of the Commerce Clause. Statutory exceptions are, however, generally interpreted narrowly. *See supra* p. 7. Even more importantly, the language of Section 2 is broader than the language of the contract-of-employment exclusion. Section 2 covers any written arbitration provision in "a contract evidencing a contract involving commerce." 9 U.S.C. § 2. As this Court has recognized, this section's reference to transactions "involving commerce" is "broader than the often-found words of art 'in commerce,'" and therefore "cover[s] more than only persons or activities within the flow of interstate commerce." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (quotation omitted). As the exclusion refers only to employees "engaged *in* foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), it is plainly more limited. Thus, even if the exclusion had covered all employment contracts that Congress could have regulated in 1925, it would by no means follow that the exclusion should continue to be read to cover all employment contracts covered by the more broadly worded Section 2.

III. THE LEGISLATIVE HISTORY OF THE FAA IS IRRELEVANT AND, IN ANY EVENT, CANNOT SUPPORT THE INTERPRETATION BELOW

In *Campbell Soup*, the Ninth Circuit asserted that the legislative history of the FAA supports its expansive reading of the contract-of-employment exclusion. *See* 177 F.3d at 1089-90. The legislative history is, however, irrelevant because where, as here, the language of the statute is unambiguous, "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). In any event, unlike the language of the exclusion, the legislative history is ambiguous and confused.

A. The Legislative History Is Irrelevant Because the Meaning of the Language of the Exclusion Is Plain.

As this Court has repeatedly recognized, the best evidence of Congress' intent is "the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Accordingly, courts should "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Instead, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quotation omitted). As demonstrated above, the text of the FAA's contract-of-employment exclusion belies any suggestion that all contracts of employment are excluded from the Act. Instead, the plain language of Section 1 shows that the exclusion covers only contracts of employment of individuals such as railroad workers and seamen who are engaged in the interstate and international movement of goods and persons. *See supra* pp. 4-12. As there is no suggestion of any extraordinary circumstances justifying disregard of this plain meaning, there

is no need even to address the legislative history of the exclusion.

B. In Any Event, the Legislative History Does Not Justify an Expansive Interpretation of the Exclusion.

The legislative history of the FAA offers little, if any, support for the Ninth Circuit's expansive interpretation of the exclusion. The legislative history as a whole is sparse, and in the little legislative history that exists, there is almost no mention of the contract-of-employment exclusion. Moreover, "[a]s is so often the case," the historical materials that exist "cut[ ] both ways." *Department of the Air Force v. Rose*, 425 U.S. 352, 388-89 (1976) (Blackmun, J., dissenting). As a consequence, the legislative history offers no basis for disregarding the plain language of the exclusion.

1. There Is No Material Discussion of the Exclusion in the Legislative History.

The legislative history of the FAA is limited. As two commentators noted shortly after the Act was passed, it is "remarkable how so important and far reaching legislation can emerge from Congress with such a dearth of intelligent discussion." Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. Rev. 428, 430 n.121 (1932). The bills that became the Federal Arbitration Act, or the "United States Arbitration Act" as it was originally titled (*see* 43 Stat. 883, 886 (1925)), were introduced in December 1923. *See* S. 68-1005 (1923); H.R. 68-646 (1923). After House and Senate subcommittees of the respective judiciary committees held a joint hearing on the bills the next month, *see Arbitration of Interstate Commercial Disputes, Hearing on H.R. 646 and S. 1005 before the Joint Comm. of Subcommittees on the Judiciary*, 68th Cong., 1st Sess. (1924) (memorandum from Julius Henry Cohen) [hereinafter "1924 Joint Hearing"], the

two committees issued short (two- and four-page) reports on the bills, *see* H.R. Rep. No. 68-96 (1924); S. Rep. No. 68-536 (1924), which were then passed unanimously by both Houses without any substantive debate, *see* 66 Cong. Rec. S2759-62 (1925); 65 Cong. Rec. H11080-82 (1924).

Even more pertinently, as one of the Ninth Circuit's own authorities concedes, there is "virtually no official legislative history" concerning the contract-of-employment exclusion. Matthew W. Finkin, *Employment Contracts under the FAA—Reconsidered*, 48 Lab. L.J. 329, 329 (1997). Neither of the committee reports mentions the exclusion, much less explains its purpose or scope. There is no mention of the exclusion in the little discussion of the Act that occurred on the House and Senate floors. And none of the witnesses at the joint hearing discussed it. Indeed, the only mention of the exclusion in all of the legislative history of the bills that became the FAA is in one sentence of one of the letters reprinted in the transcript of the joint hearing. *See* 1924 Joint Hearing 21 (reprinting a January 31, 1923 letter from Herbert Hoover to Senator Thomas Sterling).

In purporting to rely upon the legislative history of the FAA, the Ninth Circuit in *Campbell Soup* looked to testimony at a 1923 hearing before a subcommittee of the Senate judiciary committee concerning a precursor of the FAA introduced in the prior Congress. *See Campbell Soup*, 177 F.3d at 1089-90 (discussing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing before Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) [hereinafter "1923 Senate Hearing"]). Although members of this Court have consulted those hearings before, *see Gilmer* 500 U.S. at 39 (Stevens, J., dissenting); *Southland*, 465 U.S. at 25 n.7, 27 n.12 (O'Connor, J., dissenting), the testimony at those hearings is of limited value. Such testimony reflects the views of the witnesses, not the views of the members of Congress who

enacted the legislation in question. Accordingly, this Court has repeatedly held that testimony of this sort deserves "little weight." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976); *see also Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) ("declin[ing] to accord any significance to these statements" of witnesses at hearings); *McCaugh v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) (characterizing such statements as "without weight").

One commentator has suggested that the FAA should be interpreted differently because the bills that became the FAA were proposed by an American Bar Association committee in 1922 and enacted with only minor revisions. *See* Ian R. MacNeil, *American Arbitration Law* 107-09 (1992); *see generally id.* at 83-101 (discussing the ABA's successful campaign to enact the FAA). According to this commentator, the FAA was really a "legislation of adhesion," and therefore "if we wish to ascertain Congress's intention and purpose, our focal point must be what Congress understood to be the goals of those presenting the fully drafted statute." *Id.* at 108.

There are two flaws in this argument. First, the contract-of-employment exclusion was not part of the ABA's original proposal in 1922; it was instead proposed at the 1923 hearing before the Senate Judiciary Committee in response to criticism from the head of the International Seamen's Union. *See* 1923 Senate Hearing at 9; MacNeil, *American Arbitration Law* 89-91. Moreover, even though the witness making this later proposal was an ABA official, the ABA's position on the exclusion was not consistent. As explained more fully below, *see infra* pp. 23-25, although the witness who initially proposed the exclusion asserted that the FAA was not intended to be an "act referring to labor disputes at all," 1923 Senate Hearing at 9, the ABA committee that proposed the FAA in 1922 later stated that it had "originally favored the application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy." 53

ABA Reports 351 (1928). Thus, even if the intent of the ABA were relevant in general under the "legislation-of-adhesion" theory, it is by no means clear that its intent concerning the exclusion would be.

Second, whether or not Congress simply adopted the views of the ABA, it would be both improper and unfair to base an interpretation of the FAA on testimony at the 1923 Senate hearing. There were only three senators present at that hearing, *see* 1923 Senate Hearing at 1, and while the transcript of the hearing was presumably distributed to members of Congress, there is no mention of that hearing in the legislative history of the FAA. Indeed, all three witnesses who testified in 1923 before the Senate judiciary committee reappeared in 1924 at the joint hearing before subcommittees of the judiciary committees of both Houses and for the most part repeated their prior testimony. *See* MacNeil, *American Arbitration Law* 92-93. As a consequence, an ordinary citizen seeking to determine the meaning of the FAA would have no way of knowing about the Senate hearing in 1923, much less a reason to suspect that the testimony by a witness at that hearing would define the meaning and scope of the exclusion in Section 1 of the FAA. Indeed, the authors of one of the most comprehensive earlier law review articles on the FAA were unaware of the 1923 Senate hearing and therefore described the contract-of-employment exclusion as "curious as it is unaccounted for in any discussion." Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements*, 8 N.Y.U. L.Q. Rev. at 435. In short, the 1923 Senate hearings constitute a form of secret history that has no place in a truly democratic system.

In its *amicus* brief in *Gilmer*, the AFL-CIO wandered even further afield, citing the proceedings from its own convention in 1925 and that of the International Seamen's Union two years before. *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner, *Gilmer v. Interstate/Johnson Lane*

Corp., No. 90-18, at 10-24 (U.S. Nov. 15, 1990) [hereinafter "AFL-CIO Br."]. This Court has, however, consistently held that material outside the legislative process, whether or not contemporaneous, has little relevance. *See, e.g., Gustafson*, 513 U.S. at 580 ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."); *see also Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 n.* (1987) (noting that "the *post hoc* statements of interested onlookers [are] entitled to no weight"). Indeed, construing the FAA based upon statements by union leaders at their national conventions is a little bit like construing a nuclear energy bill in light of a speech by Ralph Nader before a Green Party convention. In any event, as one of the Ninth Circuit's own authorities concedes, there is no evidence suggesting that anyone in Congress relied upon the materials cited by the AFL-CIO. *See* Finkin, *Workers' Contracts*, 17 Berkeley J. Emp. & Lab. L. at 295 n.61. Thus, the historical materials upon which the Ninth Circuit relied in *Campbell Soup* have no value.

2. The Historical Materials Cited by the Ninth Circuit and Supporters of Its Interpretation Are Confused and Ambiguous

Even taken at face value, the historical materials cited by the Ninth Circuit and other supporters of a broad interpretation of the contract-of-employment exclusion are far too confused and ambiguous to provide a basis for interpreting the exclusion.

1. In *Campbell Soup*, the Ninth Circuit relied upon the 1923 Senate hearing and an amendment to Section 2 of the Act. *See* 177 F.3d at 1089-90. The ABA's 1922 proposal, which was introduced in Congress in December 1922, made any written arbitration provision in a "contract or maritime transaction or transaction involving commerce" valid, irrevocable, and enforceable. S. 67-4214 § 2 (1922); *accord* 47 ABA Reports 315 (1922). Ultimately, however, Section 2 was revised to refer to written arbitration provisions in "any

maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Assuming that this amendment was made in response to the protests of the International Seamen's Union, the Ninth Circuit concluded that Congress amended Section 2 to make clear that the FAA did not apply to any contracts of employment. *See Campbell Soup*, 177 F.3d at 1089-90.

In fact, the amendment of Section 2 was entirely independent of the response to the seamen's protest. The contract-of-employment exclusion was included in the arbitration bills introduced in 1923. *See* S. 68-1005 § 1; H.R. 68-646 § 1; *see also* 48 ABA Reports 287, 302 (1923) (noting that the ABA consented to the contract-of-employment exclusion in response to the seamen's protest). Although those bills contained an amended Section 1 thta included the exclusion, the language of Section 2 remained the same. *See* S. 68-1005 § 2; H.R. 68-646 § 2; *accord* 48 ABA Reports 302. Moreover, there was no mention of an amendment to Section 2 in the January 1924 joint hearing, and the House bill was enacted without the amended Section 2. *See* 65 Cong. Rec. H11081-82.

According to a letter from the chairman of the ABA committee that proposed the FAA, the amendment to Section 2 was suggested by a senator absent from the January 1924 joint hearing sometime after that hearing. *See* Letter from W.H. Piatt to Hon. Thomas J. Walsh, March 7, 1924, *reprinted in* 49 ABA Reports 283-84 (1924); *see also* 1924 Joint Hearing at 1 (noting that "Senator Walsh, of Montana, is detained at another hearing"). In addition, when this amendment was considered by the House, it was not treated as substantive. *See* 66 Cong. Rec. H3004 (Feb. 4, 1925). Moreover, far from disagreeing, the ABA committee stated that the change was a technical one, a simple "improvement in the language of the legislation." Letter from Piatt to Walsh, March 7, 1924, *reprinted in* 49 ABA Reports 283. Thus,

contrary to the Ninth Circuit's suggestion, the historical materials do not suggest that the amendment to Section 2 had anything to do with the contract-of-employment exclusion.

2. The Ninth Circuit also reads too much into the testimony at the 1923 Senate hearing in which the contract-of-employment exclusion was suggested. At that hearing, Senator Sterling, the sponsor of the FAA in the Senate, asked W.H. Piatt, the chairman of the ABA committee that proposed the FAA, whether he was aware of a letter the Senator had received from a constituent. The following colloquy ensued:

> Mr. PIATT. No, sir; but there is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen —
>
> Senator STERLING. Mr. Furuseth?
>
> Mr. PIATT. Yes; some such name as that. He has objected to it, and criticised it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of the bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing

> with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

1923 Joint Hearing at 9.

Quoting the last few sentences of this testimony, the Ninth Circuit concluded that the bill was not intended to apply to employment contracts of any sort. *See Campbell Soup*, 177 F.3d at 1089-90. It is not, however, clear that Mr. Piatt's testimony was so broad. Earlier, Piatt had stated that the bill was not intended to require an "industrial arbitration," which could be understood to be a reference to arbitration under collective bargaining agreements. Indeed, Senator Sterling appeared to understand the proposal in this way: later in the hearing, he referred to the witness's "suggested amendment in regard to the *labor associations*." 1923 Joint Hearing at 10 (emphasis added).

This conclusion is reinforced by a 1928 ABA proposal for a "United States Industrial Arbitration Act." 53 ABA Reports at 381. That proposal would have extended the FAA to cover arbitration provisions in written agreements "made by an employer or organization of employers *with an organization of employees*." *Id.* at 376 (emphasis added). As collective bargaining agreements are agreements between employers and organizations of employees, the ABA's committee on commerce—which in 1928 still included Julius Henry Cohen, the primary draftsman of the FAA *(see id.*; 1924 Joint Hearing at 15)—plainly understood the term "industrial arbitration" to refer to arbitration under collective bargaining agreements, not individual contracts of employment. Accordingly, there is some basis in the historical materials for the position that the contract-of-employment exclusion covers only collective bargaining agreements. *See, e.g., United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954);1 Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 11.22, at 11:6 (1999).

Furthermore, even if Mr. Piatt's testimony had clearly indicated *his* understanding that the ABA's proposal would not cover any individual employment contracts, it is by no means clear that his view was shared by the ABA as a whole. Certainly, the ABA's standing committee on commerce, which proposed the FAA, took a different view on whether the bill was intended to cover employment contracts. As indicated above, *see supra* pp. 19-20, the committee later said its original proposal was supposed to cover such contracts:

> From the foregoing it will appear that the Association originally favored the application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy . . . .

53 ABA Reports at 351.

The committee also noted that New York's arbitration statute "appl[ies] to *all* agreements to arbitrate, whether in the commercial or industrial field." 53 ABA Reports at 351 (emphasis added); *see also* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* § 32, at 108 n.24 (1930) ("It is clear that a future disputes agreement is not taken out of the application of the New York statute because it is in an employment contract.") (citations omitted). As the New York statute formed the model for the FAA, *see* S. Rep. No. 68-536, at 3, it follows that the ABA's original bill was also intended to cover arbitration provisions in employment agreements and that Mr. Piatt's suggestions to the contrary in the 1923 Senate hearing were either an idiosyncratic personal view or a disingenuous evasion. In either event, his testimony does not provide a basis for concluding that Congress or even the ABA intended the exclusion in Section 1 to cover all employment contracts.

3. In *Campbell Soup*, the Ninth Circuit also relied on a letter that Herbert Hoover sent to the Senate Committee on the Judiciary in 1923, which was reprinted in the 1924 joint

hearings. *See* 177 F.3d at 1090; *see also* 1923 Senate Hearing at 14. As noted above, *see supra* p. 18, this letter contains a sentence referring to the contract-of-employment exclusion: "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating, 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" Letter from Herbert Hoover to Hon. Thomas Sterling, Jan. 31, 1923, *reprinted in* 1923 Senate Hearing at 21. Focusing on the phrase "workers' contracts," the Ninth Circuit concluded that the exclusion was intended to cover all employment contracts. *See Campbell Soup*, 177 F.3d at 1090. This awkward phrase, which was written on the day of the Senate hearing in 1923, will not support the weight that the Ninth Circuit places upon it. As this Court has noted in an analogous context, the language of such an informal communication should not be dissected as if it were in the United States Code. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993).

4. In its *amicus* brief in the *Gilmer* case, the AFL-CIO cited some historical materials not relied upon by the Ninth Circuit. *See* AFL-CIO Br. at 16-24. None of the arguments drawn from those materials has merit.

a. The AFL-CIO noted that there was "nothing to indicate that labor's opposition was limited to the narrow range of labor contracts that would be excluded" under a narrow interpretation of the contract-of-employment exclusion. AFL-CIO Br. at 17-18. The basis for labor's objection to the FAA, the AFL-CIO asserted, was "the fear that weak unions, or individuals, would be compelled to submit to arbitration clauses, and that arbitral decision-makers would as a practical matter be under the control of the employers." *Id.* at 18 (citing 53 ABA Reports at 351-52). The AFL-CIO's brief cites, however, to views expressed in 1928 in support of this assertion. *See* 53 ABA Reports at 352 & n.*. Moreover, the

contemporaneous historical materials cited by the AFL-CIO do not speak at all about weak unions; they talk about the unequal bargaining power between workers and their employers. *See* Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203-04 (1923); Proceedings of the 45th Annual Convention of American Federation of Labor 52 (1925). This Court has, however, already rejected the suggestion that Congress did not intend to apply the FAA simply because of a disparity in bargaining power. *See Gilmer*, 500 U.S. at 33 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *see also* MacNeil, *American Arbitration Law* 90 & nn.47-48 (noting that Congress did not respond to concerns about unequal bargaining power in construction, freight, and insurance contracts). Thus, the AFL-CIO's suggestion that Congress included the contract-of-employment exclusion out of concern for unequal bargaining power is simply incorrect.

b. The AFL-CIO also observed that the subject matter of the 1924 joint hearing was "described as 'Arbitration of Interstate *Commercial* Disputes'" and that the testimony at the hearing "reflects the commercial nature of the bill." AFL-CIO Br. at 20 (quoting and emphasizing 1924 Joint Hearing at 1). The title of the 1924 hearing was, however, virtually the same as the title of the Senate hearing the year before even though the latter hearing was prior to the addition of the contract-of-employment exclusion. *See* 1923 Senate Hearing at 1 (hearing entitled "Federal Commercial Arbitration"). More fundamentally, as this Court has repeatedly recognized, the fact that the legislative history of a statute focuses upon one subject (here, commercial arbitration) does not mean that the statute is necessarily limited to that subject. *See, e.g., Pittston Coal Group v. Sebben*, 488 U.S. 105, 115-16 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history . . . ."); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679

(1983) (noting that Congress' focus on one problem "does not create a 'negative inference' limiting the scope of the Act to the specific problems that motivated its enactment").

c. Finally, the AFL-CIO relied on the ABA's 1928 proposal for an industrial arbitration act and a 1942 proposal to amend the FAA to extend to "'labor controversies.'" AFL-CIO Br. at 23-24 (quoting 88 Cong. Rec. 2072). As this Court has repeatedly stressed, however, "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Jones v. United States*, 526 U.S. 227, 236 (1999) (quotations omitted); *accord Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *United States v. Price*, 361 U.S. 304, 313 (1960). Moreover, such post-enactment history is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp.*, 496 U.S. at 650.

In any event, neither the ABA proposal nor the 1942 proposed amendments offers the AFL-CIO's expansive interpretation of the contract-of-employment exclusion any support. As noted above, the ABA proposal for an industrial arbitration act dealt with collective bargaining agreements, not individual employment contracts. *See supra* pp. 24-25. Similarly, the 1942 proposed amendments would have extended the FAA to cover written arbitration agreements "entered into by *a labor organization* with an employer or group of employers engaged in commerce *or by one labor union with another labor union*." 88 Cong. Rec. 2072 (emphasis added).[6] Thus, the post-enactment history cited by

[6] Indeed, this proposal appears to have been motivated by concerns over the enforcement of agreements to engage in interest arbitration—that is, arbitration of the terms of a new agreement rather than arbitration of the meaning of the terms of an existing agreement—not conventional (continued...)

the AFL-CIO provides more support for the position that the contract-of-employment exclusion was limited to collective bargaining agreements than it does for the Ninth Circuit's expansive interpretation—thereby demonstrating why the legislative history of the contract-of-employment exclusion is too confusing and ambiguous to provide any useful guidance. The exclusion should instead be interpreted in light of its plain language, the structure of the FAA, and the applicable rules of construction, all of which preclude the anomalous interpretation adopted below.

[6] (...continued)
arbitration of disputes arising under individual employment contracts. *See* 88 Cong. Rec. at 2072 (citing a 1940 report of the New York State Legislative Committee on Industrial and Labor Relations); *see also Report of the New York State Legislative Comm. on Industrial and Labor Relations* 38-41 (1940) (noting that New York's arbitration law did not cover interest arbitration at that time). Accordingly, the 1942 proposed amendments would have extended the FAA to cover agreements to arbitrate "controversies concerning past, present, *or future* rates of pay, wages, hours of employment." 88 Cong. Rec. 2073 (emphasis added).

CONCLUSION

For the reasons stated above, this Court should interpret the exclusion in Section 1 of the Federal Arbitration Act to be limited to contracts of employment for individuals engaged in interstate or international transportation and reverse the decision of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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